

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

DANIEL P. TABER,

Plaintiff,

V.

EXEMPLAR HOLDINGS, LLC,

Defendant.

Case No. 2:23-cv-00670-BNW

ORDER

10 Presently before the Court is Defendant Exemplar Holdings LLC's Motion to Dismiss
11 (ECF No. 10). Plaintiff filed a response in opposition (ECF No. 13) to which Defendant replied
12 (ECF No. 14). Also before the Court is Plaintiff's Motion to Strike (ECF No. 15). Defendant filed
13 a response in opposition (ECF No. 16) to which Plaintiff replied (ECF No. 17).

14 || I. Background

15 Plaintiff's complaint alleges a breach of contract claim against Defendant. Plaintiff
16 alleges that Defendant proposed a project to develop an off-patent "pedicle screw system" and
17 related spinal implant products ("the Spine Project"). Complaint, ECF No. 1 at 2. Plaintiff, a
18 citizen and resident of California, worked on the Spine Project from July 2013 through April
19 2017 from his home office. *Id.* at 3. Plaintiff alleges Defendant told him he would be paid by
20 Defendant's principal, Gregory Orman, when Plaintiff delivered the "pedicle screw system." *Id.*
21 at 5.

22 Plaintiff invoiced Defendant on May 25, 2017, for his time and expenses through April
23 2017. *Id.* Plaintiff sought compensation and reimbursement of expenses in the amount of
24 \$265,599.41. *Id.* Plaintiff was never paid. *Id.*

25 Plaintiff filed the present complaint on April 28, 2023, alleging breach of contract.¹
26 Defendant then filed the present motion to dismiss asserting that applying either California or

¹ The complaint does not explicitly separate the different claims that may be alleged. In turn, Defendant argues Plaintiff may be trying to allege other claims besides breach of contract (i.e., breach of the implied covenant of good

1 Kansas law, Plaintiff's claims are barred by the statute of limitations. Plaintiff asserts that the
 2 Nevada statute of limitations applies since Exemplar Holdings LLC is organized in Nevada. The
 3 parties are familiar with the arguments. As a result, the Court will not summarize them and will
 4 instead incorporate them, as needed, into the Order.

5 **II. Standard for a Motion to Dismiss**

6 An initial pleading must contain "a short and plain statement of the claim showing that the
 7 pleader is entitled to relief." Fed. R. Civ. P. 8(a). The court may dismiss a complaint for "failure
 8 to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In ruling on a motion
 9 to dismiss, "[a]ll well-pleaded allegations of material fact in the complaint are accepted as true
 10 and are construed in the light most favorable to the non-moving party." *Faulkner v. ADT Sec.*
 11 *Services, Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013) (citations omitted).

12 To survive a motion to dismiss, a complaint need not contain "detailed factual
 13 allegations," but it must do more than assert "labels and conclusions" or "a formulaic recitation of
 14 the elements of a cause of action" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*
 15 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, a claim will not be
 16 dismissed if it contains "sufficient factual matter, accepted as true, to state a claim to relief that is
 17 plausible on its face," meaning that the court can reasonably infer "that the defendant is liable for
 18 the misconduct alleged." *Id.* at 678 (internal quotation and citation omitted). The Ninth Circuit, in
 19 elaborating on the pleading standard described in *Twombly* and *Iqbal*, has held that for a
 20 complaint to survive dismissal, the plaintiff must allege non-conclusory facts that, together with
 21 reasonable inferences from those facts, are "plausibly suggestive of a claim entitling the plaintiff
 22 to relief." *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

23 The party asserting a statute of limitations defense bears the burden of proof. *See Nev.*
 24 *Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 338 P.3d 1250, 1254 (Nev. 2014). If it is

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 26 faith and fair dealing and unjust enrichment). Defendant argues that, if those claims are alleged, they are barred by
 27 the statute of limitations. Plaintiff has failed to file points and authorities in opposition to that portion of Defendant's
 28 motion. As a result, to the extent Plaintiff's complaint alleged those claims, the Court dismisses them in accordance
 with Local Rule 7-2(d).

1 apparent from the face of the complaint that claims are time-barred, a statute of limitations
 2 defense can require dismissal pursuant to Rule 12(b)(6). *See Von Saher v. Norton Simon Museum*
 3 *of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010); *Aldrich v. NCAA*, 484 F. Supp. 3d 779,
 4 796-98 (N.D. Cal. 2020). If, from the allegations of the complaint, an asserted defense raises
 5 disputed issues of fact, dismissal under Rule 12(b)(6) is improper. *ASARCO, LLC v. Union*
 6 *Pacific R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014).

7 **III. Application of the Statute of Limitations**

8 This Court has diversity jurisdiction over this action. When a federal court exercises
 9 diversity jurisdiction, it applies the substantive law of the forum state, including its statutes of
 10 limitation. *Albano v. Shea Homes Ltd. Partnership*, 634 F.3d 524, 530 (9th Cir. 2011); *Wilcox v.*
 11 *Williams*, 5 Nev. 206 211-212 (1869); *Urban Outfitters, Inc. v. Dermody Operating Co., LLC*,
 12 572 F.Supp.3d 977, 994 (D. Nev. 2021). Even when it appears that there is a choice-of-law issue
 13 at play, Nevada, as the forum state, follows the “classical rule,” applying its statutes of limitation
 14 in contract cases. *Sierra Diesel Injection Serv. v. Burroughs Corp., Inc.*, 648 F. Supp. 1148, 1152
 15 (D. Nev. 1987) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941));
 16 *Wilcox*, 5 Nev. at 212 (“no matter where the contract was made, the Statute of Limitations of the
 17 forum govern the remedy”).² As a result, the Court will apply the Nevada statute of limitations
 18 for claims arising from a contract.

19 **A. Statute of limitations – Contracts not founded upon an instrument in writing**

20 Nevada Revised Statute section 11.190(2)(c) requires actions “upon a contract, obligation
 21 or liability not founded upon an instrument in writing” to be commenced within four years. Nev.
 22 Rev. Stat. § 11.190(2)(c). Neither Plaintiff’s complaint nor his response to Defendant’s motion to
 23 dismiss include facts to suggest that his claim arose any later than January 2018 (which would
 24 have been seven months after Plaintiff invoiced Defendant for the previous five years of work and

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 26
 27 ² The Court notes that this rule may be modified in Nevada if the parties’ contract expressly chooses another
 28 jurisdiction’s limitations period. *See Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mtg. Investors*, 609 P.3d
 270, 273 (Nev. 1979). Based on the allegations of the complaint and the facts before the Court, it is impossible to
 make that determination at this stage.

1 the last time that he heard from Defendant). Plaintiff filed his complaint on April 28, 2023.
 2 Therefore, any claims in Plaintiff's complaint based on a breach of an oral contract are untimely
 3 and are dismissed.³

4 **B. Statute of limitations – Contracts founded upon an instrument in writing**

5 Nevada Revised Statute section 11.190(1)(b) requires actions "upon a contract, obligation
 6 or liability founded upon an instrument in writing" to be commenced within six years. Nev. Rev.
 7 Stat. § 11.190(2)(c). Initially, it appears that a claim for breach of a written contract in this action
 8 would not be barred, because Plaintiff filed his complaint less than six years after his claim arose.
 9 However, Nevada has made a choice to limit actions that accrue out of state. Nev. Rev. Stat. §
 10 11.020.⁴ The "borrowing statute" states:

11 When a cause of action has arisen in another state . . . and by the laws thereof an
 12 action thereon cannot there be maintained against a person by reason of the lapse
 13 of time, an action thereon shall not be maintained against the person in this State[.]

14 *Id.* Under Nevada law "the cause of action on an obligation accrues [or arises] in the place
 15 where the defendant *resided* when the obligation came due." *Alberding v. Brunzell*, 601 F.2d 474,
 16 477 (9th Cir. 1979) (emphasis added) (citing *Lewis v. Hyams*, 63 P. 126 (Nev. 1900)). In turn, for
 17 the borrowing statute to apply, Defendant must first establish that Defendant resided in a different
 18 state at the time the action accrued.

19 Defendant asserts that the cause of action arose in Kansas which is the place of
 20 Defendant's residence. As a result, per the borrowing statute, Kansas's five-year statute of
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22 ³ Alternatively, if the Court were to apply the California or Kansas statutes of limitation governing oral contracts,
 23 those claims would also be untimely and dismissed. *See* Cal. Civ. Code Proc. § 338 (two years) and Kan. Stat. Ann. §
 24 60-512 (three years), respectively.

25 ⁴ Plaintiff urges the Court to strike Defendant's arguments regarding the borrowing statute, raised for the first time in
 26 Defendant's reply (ECF No. 14) in support of its motion to dismiss. However, Defendant's argument was properly
 27 made in response to Plaintiff's assertion that the Nevada statute of limitations applied to Plaintiff's breach of contract
 28 claim. Further, Plaintiff's briefing (ECF Nos. 15 and 17) on his motion to strike reads more like a sur-reply. Those
 briefs contain Plaintiff's extensive argument that the borrowing statute should not bar his claim. Therefore, the Court
 will construe Plaintiff's briefing on the motion to strike as a sur-reply to Defendant's argument that Nevada's
 borrowing statute bars the breach of contract claim. Granting the motion to strike and requiring the parties to re-brief
 the issue would not meet Federal Rule of Civil Procedure 1's mandate to construe and administer the Rules in a just,
 speedy, and inexpensive manner. Therefore, the motion to strike is denied.

1 limitations applies.⁵ However, the Court finds that Defendant has not met its burden at the motion
 2 to dismiss stage. First, Defendant has not cited its legal basis for the proposition that despite being
 3 organized under the laws of Nevada, it is a Kansas resident. Second, determining where the cause
 4 of action arose pursuant to the borrowing statute requires the Court to consider facts outside the
 5 complaint. Therefore, the Court denies Defendant's motion to dismiss the breach of written
 6 contract claim without prejudice.

7 **IV. Motion for a More Definite Statement**

8 Alternatively, Defendant also moves for a more definite statement. Defendant seeks more
 9 details surrounding Plaintiff's claim for breach of contract, such as the names of the parties to the
 10 contract and whether the contract was written or oral. Generally, Federal Rule of Civil Procedure
 11 12(e) is "aimed at unintelligibility rather than lack of detail and is only appropriate when the
 12 defendant cannot understand the substance of the claim asserted." *Conta v. City of Huntington*
 13 *Beach*, 2022 WL 3574439 at *2 (C.D. Cal. June 22, 2022). In this case, Plaintiff's complaint is
 14 not so unintelligible that Defendant cannot frame a responsive pleading. Additionally, the fact
 15 that the information Defendant seeks is easily obtainable through discovery counsels against
 16 granting a motion for a more definite statement. *See Underwood v. O'Reilly Auto Parts, Inc.*, 671
 17 F. Supp.3d 1180 (D. Nev. 2023) (if detail sought through motion is obtainable through discovery,
 18 the motion should be denied). Accordingly, the Court denies Defendant's motion for a more
 19 definite statement.

20 **V. Conclusion**

21 **IT IS HEREBY ORDERED** that Defendant Exemplar Holdings LLC's Motion to
 22 Dismiss (ECF No. 10) is **GRANTED in part and DENIED in part**;

23 **IT IS FURTHER ORDERED** that Defendant's motion to dismiss all claims other than
 24 breach of contract claims is **GRANTED**;

25 **IT IS FURTHER ORDERED** that any claim for breach of an oral contract is
 26 **DISMISSED**;

27
 28 ⁵ Kan. Stat. Ann. § 60-511.

IT IS FURTHER ORDERED that the motion to dismiss Plaintiff's claim for breach of a written contract is **DENIED without prejudice**;

IT IS FURTHER ORDERED that Defendant's motion for a more definite statement is **DENIED**;

IT IS FINALLY ORDERED that Plaintiff's Motion to Strike (ECF No. 15) is **DENIED**.

DATED: March 1, 2024.

Brenda Weksler
BRENDA WEKSLER
UNITED STATES MAGISTRATE JUDGE